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Sidney Picker Jr.

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INTRODUCTION AND HISTORY OF THE CANADA-UNITED STATES LAW INSTITUTE

Sidney Picker, Jr.

I am Sidney Picker, Jr., an emeritus professor of the faculty at Case Western Reserve Law School. I am also Chair of the Canada-United States Law Institute's Advisory Board as well as the Institute's founder and initial U.S. Director. As such, one of my tasks is to welcome you to this, the 29th Anniversary Annual Conference of the Institute, on "UNDERSTANDING EACH OTHER ACROSS THE LARGEST UNDEFENDED BORDER IN HISTORY," and, briefly, to indicate the origins and activities of the Canada-United States Law Institute.

Many of you are already familiar with descriptions of the Institute's programs, enshrined regularly in the first few pages of the annual issue of the Canada-U.S. Law Journal. Hence, this year, I thought I would vary my introduction slightly by focusing not so much on a description of the traditional Institute programs but rather to tell you why the Institute came into existence in 1976. This may help explain how it took the form it did. Furthermore, to the extent some of the original reasons for the Institute's establishment may no longer be applicable while new challenges it may address have meanwhile emerged, the Institute's current form may warrant modification. It is my goal in this introduction, therefore, to provide some sense of historical perspective with a view not only to provide better understanding of traditional Institute activities but also to offer a basis for Institute members and friends to consider possible future programs so that the Institute can better adapt to and meet 21st century needs.

That historic perspective requires a brief statement of my personal background. Thirty-six years ago I was engaged as the first full-time international law faculty member at the Case Western Reserve Law School. My professional qualifications for the position included a conventional academic grounding in public international law together with substantial professional experience with both global and Pacific Basin international trade. None of it indicated any expertise, experience, or even knowledge of Canada-U.S. or North American affairs. Mine was a bicoastal and overseas background (raised in California, and educated and employed only on both coasts or abroad), and coming to Case Western Reserve in Cleveland (America's presumed heartland) was a new geographic and cultural experience for me.

Hence, when in 1973 I was asked by the American Society of International Law (ASIL) to organize a regional conference in Cleveland on whatever subject I selected, I chose as a topic a subject which seemed at the time appropriate to Cleveland if not to me. Recognizing Cleveland as a border (some would say north coast) city, that inevitably meant a topic related to the other side of that border, Canada - a country about which, like many Americans, I knew little beyond the Mounties and Sigmund Romberg's Rose Marie.

In 1973 Canada had a consulate in Cleveland, so with the help of that office and Canada's embassy in Washington, I hobbled together a conference on Canada-U.S. Energy Development. To my astonishment, the conference was a sufficient success that the following year the ASIL asked for another. Again I picked a Canadian-American topic, this time "Trade." Again, the Canadian government through its Consul and Embassy helped. This conference was an even bigger success as, out of the closet came both a core of interested academics from both sides of the border as well as Canadian and American private and government lawyers and business types whose professional careers, either directly or indirectly, revolved around the Canada-U.S. relationship.

After two years and two conferences, it finally occurred to me to investigate further about Canada. I discovered that while many American law schools had foreign studies programs of all kinds - European legal studies, Asian and African legal studies, Socialist legal studies (remember, it was 1975), covering practically every corner of the earth, none had a Canadian legal studies program. Even more interesting, I began to look at Canadian law schools, and while they too had begun to establish foreign studies programs including everywhere from the more predictable Britain and France to the then more exotic East Africa, none had a developed U.S. legal studies program. All this notwithstanding the fact statistics uniformly indicated that with respect to everything from trade and investment to tourist traffic and strategic defense cooperation, each country was the other's most significant partner. Yet except for those few professionals in the closet who serviced this partnership, few Canadians and virtually no Americans seemed aware of the relationship. For example, an overwhelming majority of the Case legal community, when asked who America's biggest or most significant trade, investment, or strategic defense partner was, identified either the UK, the then EEC (now EU), Japan, or even Mexico, but never Canada.

A further investigation indicated that this lack of awareness at Case was mirrored throughout North America where there were virtually no bi-national legal studies programs in either U.S. or Canadian law schools. However, this omission was less true in other academic disciplines which found organized voice in the Association for Canadian Studies in the United States (ACSUS), a U.S. based nonprofit organization which monitored Canadian

studies programs throughout the U.S. ACSUS membership and activities included programs in history, economics, medicine, math, architecture and engineering, music and art - virtually every significant discipline and profession except law. It followed, therefore, that the whole legal relationship underpinning the Canada-U.S. partnership was in the closet.

It seemed, however, that law should be pedagogically the most logical and inevitable discipline for Americans and Canadians. To begin, even if no law school reflected any awareness of it, there nevertheless had to be an international legal foundation for the management of the multifarious economic, social, political and cultural relationships between the two countries. Furthermore, there was a logical "comparative law" component, both as a source of jurisprudential learning, to see how another country legally addresses similar social, political, economic or cultural issues (the point of U.S. Supreme Court Justice Ginsberg's address to the American Society of International Law in 2005), and also as an extraterritorial factor. With all that interaction, each country's legal system inevitably impacts the others. Furthermore, the comparison of each with the other made significant sense since they shared not only the social, political, economic and cultural issues each legal system addressed, but the two legal systems were sufficiently similar to make comparative study readily accessible and understandable. Both are common-law based with some civil law input, both rest on constitutional principles, and both are federated societies. By taking advantage of the similarities while examining the differences, significant insights into one's own legal system would become readily apparent. Hence, it seemed almost "mal-teaching" to ignore all the Canada-U.S. legal relationship.

It was in this context that the concept of a Canada-U.S. Law Institute evolved. By now more sensitive to Canadian feelings about the U.S. elephant next door, and anxious to avoid even the appearance of Yankee patronization, I rejected the idea of a "Canadian Legal Studies" program at Case and instead opted for a more co-equal "Canada-U.S. Legal Studies" program to be run jointly by a Canadian and an American law school. For that reason the Institute took the form of an agreement between the universities of the 2 law schools rather than a separate legal personality which could only come into formal existence under the national incorporation laws of one or the other country. For better or worse, that became the framework for the Institute, and, after exploratory talks with a number of Canadian law schools, the school which finally agreed to co-partner the Institute with Case was the University of Western Ontario. For administrative purposes each law school adopted as its own the curriculum and faculty of the other in order to minimize costs and more smoothly operate the contemplated programs. Governance was left to the two faculties under the guidance of twin co-directors, one at each law school, who operated in consultation with each other and pursuant to faculty supervision. Funding support came from both sides of the

border, and because the Institute then avoided legal personality, financial donations were channeled through the two Universities.

Though seen primarily as pedagogical (that is, for the benefit of the two law school communities for the purpose of teaching, scholarship, and publication), with the help of Henry King, who was then International Corporate Counsel at TRW, Case and Western Ontario very quickly understood that a law school-based academic institute of this kind could also serve the private and public bars of both countries by providing fora for the exchange of information and ideas as well as the promotion and development of structures and machinery to better explore and manage the unique Canada-U.S. relationship.

Even the name of the Institute was carefully chosen. First, to my mind, the word "Institute" carried not only academic cache, but more important, it connoted commitment to institutionalized permanence. Merely calling it a "program" might make it easier to abandon at the first sign of stress. And stress, certainly in the break-in stage, with two law schools jointly operating such a program, was inevitable. Hence, to survive the rough patches, like a marriage, the word "Institute" bound each of the two schools to resolve rather than withdraw from problems.

We further concluded that the name also needed to include the words "Canada-United States." They are descriptively accurate, but more importantly, by starting with those words we were more likely to be readily accessible to and discoverable by anyone seeking directory or other access to such an organization. And the word immediately following "Canada-United States" needed to be "Law" (to distinguish the Institute from all those then-existing Canada-US relationships" in business, science, the arts, was "Law.")

It was in this context that the Institute was launched in 1976. Within the classrooms we devised everything possible to maximize the opportunity for effective comparative law. Faculty members would be encouraged to single out and call on the exchanged students for the other country's approach to whatever the subject of the day was, thereby making them stand out so that the "host" students in the class would be exposed to a alternate legal approach. Faculty members at each law school would also be encouraged to invite their counterparts from the sister school's faculty for several days of guest lectures, both as another way to expose students to the other country's legal solutions, and also to promote the building of a relationship between faculty members for research and teaching purposes. Semester-long faculty exchanges were also established. Thus, for example, a CWRU professor taught a comparative corporate governance course at UWO; Tax professors from UWO and CWRU jointly established and taught a Comparative Tax Policy seminar. A CWRU Constitutional law faculty member developed a Comparative Constitutional course. CWRU Prof. Lewis R. Katz was awarded an Institute grant to research and write an article for the newly es-

established Canada-U.S. Law Journal on a comparison of police practices with and without the exclusionary rules of evidence. In sum, the concept was to touch as many law disciplines affecting Canada and the U.S. as well as their relationships as possible, including public policy, commercial law, corporate governance, criminal law, civil rights, environmental and health regulation, insurance, and so on.

Outside the classroom but within the law school framework, the Institute offered students bi-nationwide an additional opportunity to partake of Canada-U.S. activities when the Institute became the organizing host for the Niagara International Moot Court Competition, a simulated World Court moot but always involving a hypothetical problem between the U.S. and Canada. At least a score of law schools in both countries take part every year.

Focusing on the developing international and domestic law affecting the Canada-U.S. relationship in a variety of legal disciplines while simultaneously reaching out to serve the practicing and public sector bars in both countries, we introduced conferences and symposia. Though not as extensive as the current Annual conference, these conferences and symposia were held throughout the academic year, and they were held not only in London and Cleveland (the homes of the two partner law schools) but also in third cities, beginning in 1982 with a Contemporary Tax Issues conference held in Toronto. The conferences then focused on a broad spectrum of public as well as economic law issues. Of these, perhaps the most significant was 1980's conference on a Comparison of the Role of the Supreme Court in Canada and the United States which brought together in a public conference format, for the first time, members of the two courts (Canada's Hon. Brian Dickson and America's Justice Potter Stewart).

In the early '80s CWRU's Prof. Ronald Coffey organized the Institute's first three day in-depth interactive conference format with participant-prepared materials supplied to attendees well in advance in order to assure preparation and hence, active participation. So successful was that model that, when Henry King retired as TRW's International Corporate Counsel and joined CWRU to succeed me as U.S. director, he established it as the basis for an Annual Conference held at the same time every year. The annual conference focuses on the economic relationship between the two countries, and so successful has Prof. King's Annual Conference format been that it is today the core Institute activity with participants and attendees coming from industry, the bar, and government offices throughout the U.S. and Canada.

In the intervening 29 years the Institute's programs have ebbed and flowed as we have ironed older wrinkles and uncovered others not apparent in 1976. It has grown, and it must continue to grow and adapt to the 21st century times in which it now finds itself. As the Institute approaches its 30th year its Advisory Board of Directors is currently reviewing the Insti-

tute's mission, activities and structure with a view to recommending modifications necessary to allow it to build on its success in the 20th century. And when you come next year - and Henry King already has that planned - we expect to inaugurate an Institute prepared to take us well into this new century.

The Institute owes a debt of gratitude to many individuals and organizations who have supported its various activities during the past 29 years, both financially and intellectually. Included are the Canadian Embassy in Washington, D.C. as well as the Canadian Consulates General, first in Cleveland, Ohio, and later, after that office was closed, in Detroit, Michigan. In addition, private nonprofit institutions in both countries have contributed generously since the Institute's establishment. These include the William H. Donner Foundation, the Gund Foundation, the Cleveland Foundation, the Richard G. Ivey Foundation, and the Ontario Bar Foundation.

As the founder of this Institute, I in turn owe a particular debt to the person I am about to introduce, Prof. Henry King, the current U.S. Director of the Institute who at the time of the Institute's founding, was International Corporate Counsel at TRW and the principal person who offered me the guidance and advice essential to launching the Institute.

Prof. King's background, as you all know, is extraordinary. He began his legal career by serving on the prosecuting team at the Nuremberg War Crimes Trials in Germany after World War II, about which he wrote and published "The Two Worlds of Albert Speer," published by University Press. His interest in international human rights is ongoing, and he is regularly called on to lecture publicly on his Nuremberg experiences as well as his insights on the development of international law designed to protect human rights.

His post-Nuremberg career led him into an international corporate practice where he played a significant public affairs role. He has served as Chairman of the Section of International Law and Practice of the American Bar Association as well as U.S. Chairman of the Joint American Bar Association-Canadian Bar Association (ABA-CBA) Working Group on the Settlement of International Disputes between Canada and the United States. More recently, he served as U.S. Chair of the Joint American Bar Association-Canadian Bar Association-Barra Mexicana Working Group on the Settlement of International Disputes.

It is a great pleasure for me therefore to present to you the U.S. Director of the Institute, Henry King.